

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANQUAVIS KING MURRELL,

Defendant-Appellant.

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UNPUBLISHED

February 10, 2011

No. 294576

Wayne Circuit Court

LC No. 09-014513-FC

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Manquavis Murrell asserts the ineffective assistance of counsel for failing to seek to suppress his identification by the victim at the preliminary examination as the basis to challenge his bench trial convictions for armed robbery<sup>1</sup> and possession of a firearm during the commission of a felony (felony-firearm).<sup>2</sup> Murrell was sentenced to consecutive sentences of 51 months to 15 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Murrell asserts that because he was dressed in prison garb at the preliminary examination, the circumstances of his identification by the victim at this hearing were rendered unduly suggestive. He contends that he was denied the effective assistance of counsel because his attorney did not seek to suppress this identification. Murrell never raised the issue of his preliminary examination identification in the trial court. "Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice."<sup>3</sup>

Manifest injustice would not result from our refusal to review this unpreserved issue. Even when a pre-trial procedure is deemed to be unduly suggestive, in-court identification may

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 750.227b(1).

<sup>3</sup> *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

be permitted where the prosecutor demonstrates by clear and convincing evidence that an independent basis exists for the identification.<sup>4</sup> While an evidentiary hearing was not conducted in this case to determine whether an independent basis existed for the victim's identification of Murrell, a review of the record shows that the victim identified Murrell through a photographic line-up before the preliminary examination was conducted. The victim testified that she had the opportunity to observe Murrell in close physical proximity at the time of the robbery. Despite Murrell's use of a bandana to cover portions of his face and hair, the victim indicated that certain physical characteristics regarding his eyes and head shape were sufficiently unique to be readily identifiable. When the pictures in the photographic lineup were covered in a manner similar to the use of bandanas by the perpetrator, the victim readily identified Murrell. Although Murrell was dressed in prison garb at the preliminary examination, there is sufficient evidence to demonstrate that the victim's identification was not based simply on his apparel, but rather on his stature and mannerism, as she indicated "[w]hen he walked in the room, my stomach did a back flip. I started sweating. I knew it was him." There is no suggestion that the victim's general description of the perpetrator immediately following the robbery does not coincide with Murrell's physical characteristics. Even if we were to determine that the preliminary examination identification was unduly suggestive because of Murrell being dressed in prison garb, the record sufficiently demonstrates that an independent basis existed for the in-court identification<sup>5</sup> and, therefore, no manifest injustice results from our refusing to grant relief on this issue.

Murrell next contends that he was denied the effective assistance of counsel as his attorney did not attempt to suppress the unduly suggestive in-court identification. To establish that counsel was ineffective, Murrell "must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial."<sup>6</sup> In order to demonstrate prejudice, Murrell must show that a reasonable probability exists that, but for his counsel's deficient performance, the result of the proceeding would have been different.<sup>7</sup> Because Murrell's claim of ineffective assistance of counsel is also not preserved for this Court's review, his claim is considered based only on the existing record.<sup>8</sup>

The victim testified that she had an opportunity to observe Murrell in close physical proximity during the robbery. She accurately described him after the robbery and readily identified him in a photographic lineup before the preliminary examination. As such, Murrell has failed to demonstrate a reasonable probability that the outcome of the trial would have been

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<sup>4</sup> *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

<sup>5</sup> *People v Gray*, 457 Mich 107, 115-117; 577 NW2d 92 (1998).

<sup>6</sup> *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

<sup>7</sup> *Id.* at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>8</sup> *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

different had counsel moved to suppress the preliminary examination identification. And, based on the victim's opportunity to observe the perpetrator and her consistent identification of Murrell, we are not convinced that any motion by defense counsel seeking to suppress the in-court identification would have been successful. Because counsel is not deemed to be ineffective for failing to make motions or raise objections that would be futile<sup>9</sup>, Murrell's claim pertaining to the effectiveness of counsel cannot be sustained.

Affirmed.

/s/ Michael J. Talbot

/s/ David H. Sawyer

/s/ Michael J. Kelly

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<sup>9</sup> *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).